

NO. 22681

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHELE MARCHESE,

Appellant,

vs.

UNITED STATES OF AMERICA, et al.,

Appellees.

APPELLEES' BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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APPELLEES' BRIEF

I

STATEMENT OF THE CASE

A. Statement of Facts.

As stated by appellant Marchese, in his opening brief on the instant appeal, the District Court made an order, on December 5, 1967 (entered on December 6) (C. T. 10), ^{1/} denying his latest motion to vacate sentence under 28 U. S. C. 2255. The Order was grounded upon the District Court's determination that

1/ "C. T. " refers to Clerk's Transcript.

the files and records of the case conclusively show that Marchese was entitled to no relief. It was made "without prejudice to the right of petitioner to file application for writ of habeas corpus". The "2255" motion was presented on a mimeographed form entitled "Motion, Pursuant to Sec. 2255 of Title 28, United States Code by a Person in Federal Custody (Ancillary to No. 26762 C.D.)" (C. T. 2).

To summarize, the "2255" motion raised, or purported to raise, an issue pertaining to the use, by federal narcotics agents, of a hidden transmitting device upon the person of an undercover informant, which sent its signals to a receiver to which the agents listened.

The history of appellant's various applications for post-conviction relief in the District Court, and the multitude of proceedings at the appellate level, both in this Honorable Court and in the Supreme Court of the United States, are in substance summarized at page five of the aforementioned mimeographed form of the "2255" motion (C. T. 2). The history of such proceedings, as of February 10, 1965, are also summarized in this Honorable Court's Opinion in United States v. Marchese, 341 F.2d 782, 784 (9th Cir. 1965).

B. Question Presented.

Whether the District Court Erred in Denying the Instant Motion Under 28 U.S.C. 2255, Where the Files and Records of

the Case Conclusively Show Petitioner is Entitled to No Relief.

II

ARGUMENT

WHERE, AS IN THE INSTANT CASE, THE FILES AND RECORDS OF THE CASE SHOW CONCLUSIVELY THAT THE PETITIONER IS ENTITLED TO NO RELIEF, THE DISTRICT COURT DID NOT ERR IN SUMMARILY DENYING HIS MOTION UNDER TITLE 28 UNITED STATES CODE, SECTION 2255.

The essence of Appellant's Opening Brief is that, notwithstanding his multitudinous applications for post-conviction relief, and appellate hearings and attempts at re-hearings thereon, and petitions for certiorari to the United States Supreme Court, he is entitled to be discharged from the custody of the Attorney General of the United States because a hidden transmitting device was carried upon the person of an undercover informant while he conversed with Mr. Marchese. (Counsel make various assertions, aliunde and de hors the record, concerning appellant's good prison behavior, and speculate as to Judge Clarke's views concerning this protracted case, but these are not matters which form a proper or permissible basis for a ruling upon a "2255" motion. United States v. Marchese, supra, 341 F.2d at 787-789, 801.)

The "hidden transmitter" issue was previously raised, and most recently disposed of by this Honorable Court, in its opinion in Marchese v. United States, 378 F.2d 16 (9th Cir. 1967)

There it was said, 378 F.2d at 17:

"On February 10, 1965, this court referred to the legal maneuvers of appellants [Marchese and his accomplice, one Del Bono] to avoid imprisonment (341 F.2d 782), after their conviction in 1958 by a jury (and the affirmance of their convictions in 1959 by this court) of selling two pounds of heroin. Their petitions for a writ of certiorari were denied by the Supreme Court. 360 U.S. 930, 79 S.Ct. 1447, 3 L.Ed.2d 1543 (1959) and 360 U.S. 938, 79 S.Ct. 1463, 3 L.Ed.2d 1550 (1959). This court described the matter as 'extraordinary', on their second appeal. The appellants' freedom on bail as of this date is even more extraordinary; and a sad commentary on how delays can be achieved that destroy any faith in the certainty of punishment for crime."

In the opinion, this Court went on to say, 378 F.2d at 17:

"No new matters, not heretofore passed upon, are raised on this appeal. We were asked in oral argument to anticipate what the Supreme Court of the United States might say or do in *Katz v. United States*, 9 Cir., 369 F.2d 130, certiorari granted March 13, 1967, and further to anticipate that whatever that Court might say or do would be held retroactive in effect. This we decline to do. We prefer to follow, as we must, the last views expressed

by a majority of the Supreme Court in *Osborn v. United States*, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966). Here, as in *Osborn*, supra, the electronic device was used by and with the consent of one party to a conversation to make an accurate record thereof. The tape recording did not involve 'the surreptitious surveillance by an outsider.' "

The Federal cases cited by appellant in his instant brief, in support of the proposition that the use of the concealed transmitting device in question violated his constitutional rights, all involved "bugging", to-wit, the placement of an eavesdropping device either outside or inside a place where the accused was speaking. To be sure, the "physical penetration", and related "tests", are no longer controlling. But this is not a "bugging" case; it merely involves the use of a corroborative listening device -- a device employed to insure to the accuracy of reports and recollections of an undercover agent.

Such was recognized and ruled upon by this Honorable Court in its aforementioned opinion reported at 378 F.2d 16.

In short, the use of corroborative listening devices, attached to the persons of informants, is not violative of the confidant's constitutional rights, and even in the highly unlikely event that it were ever so held, it is extremely doubtful that any decision so holding would be applied retroactively.

See: Linkletter v. Walker, 381 U.S. 618,
85 S. Ct. 1731, 14 L.Ed.2d 601 (1965);
Johnson v. New Jersey, 384 U.S. 719,
86 S. Ct. 1772, 16 L.Ed.2d 882 (1966);
Lee v. Wilson, 363 F.2d 824 (9th Cir. 1966);
Lester v. Wilson, 363 F.2d 824 (9th Cir. 1966).

Since the "hidden transmitter" issue relative to the Marchese prosecution has thus been ruled upon, the District Court was amply justified in summarily denying the subject "2255" motion.

Title 28, U. S. C. , Section 2255;
Sanders v. United States, 373 U.S. 1, 15,
83 S. Ct. 1068, 10 L.Ed.2d 148 (1963);
Marchese v. United States, 378 F.2d 16, 17-18
(9th Cir. 1967);
United States v. Marchese, 341 F.2d 782, 784-785
(9th Cir. 1965).

The statute and the cases above cited all hold that the District Court is in no respect required to hear a motion such as the one in question, and may summarily deny it, where the issues sought to be raised have been litigated on previous occasions.

With respect to appellant's assertions regarding the remedy of habeas corpus, suffice it to say that they are not germane to any action of the trial court herein, and are not proper subjects for discussion in the instant matter.

III

CONCLUSION

The District Court did not err, and its Order denying appellant's instant "2255" motion should be affirmed.

Respectfully submitted,

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